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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79161731
Applicant	Universal Entertainment Corporation
Applied for Mark	GODDESSES HERA
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application No.:     **79/161,731**     :     Law Office: **104**  
Filed:             **January 15, 2015**                     :     Examining Attorney:  
Applicant and Appellant:                                 :             **Michael Eisnach**  
                  **Universal Entertainment Corporation**     :  
Mark:             **GODDESSES HERA**                     :

**APPEAL BRIEF**

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**A. INTRODUCTION**

Universal Entertainment Corporation (hereinafter “Applicant”) appeals the Examining Attorney’s final refusal to register the Applicant’s mark GODDESSES HERA, U.S. Serial No. 79/161,731, for use with the following goods in International Class 028:

Gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid crystal displays

The Examining Attorney refused to register Applicant’s mark under section 2(d), because of an alleged likelihood of confusion with the mark HERA’S GOLD in U.S. Registration No. 4,329,291 for “computer gaming software and computer gaming software downloadable via a computer or wireless network that provides for the play of a game of chance at a device” in International Class 009, and “gaming machines, namely, devices which accept a wager” in International Class 028.

For the reasons stated below, Applicant respectfully requests the Trademark Trial and Appeal Board reverse the Examining Attorney’s refusal.

**B. THE RECORD**

The record for this appeal consists of the prosecution history of U.S. Application Serial No. 79/161,731, which includes the following documents and exhibits:

An application for extension of protection from International Application No. 1238913 dated March 12, 2015;

An Office Action dated April 22, 2015 with attachments;

A response to the Office Action dated August 25, 2015, with Exhibit A (a printout identifying the potential meanings of “Hera”);

A Final Office Action dated August 29, 2015, with attachments 1-57;

A Request for Reconsideration dated February 4, 2016;

A Notice of Appeal, filed February 4, 2016; and,

A denial of the Request for Reconsideration dated February 29, 2016, with attachments 1-44.

### **C. ISSUE PRESENTED**

Whether Applicant’s mark GODDESSES HERA is confusingly similar to the registered mark HERA’S GOLD.

### **D. ARGUMENT**

#### **1. BACKGROUND**

Likelihood of confusion under the Lanham Act, 15 U.S.C. §1052(d) is a legal determination based upon factual underpinnings. *On-Line Careline, Inc. v. Am. Online, Inc.*, 56 USPQ2d 1471 (Fed. Cir. 2000). The determination is made by reference to the thirteen factors set forth in *In re E.I. Du Pont de Nemours & Co.*, 176 USPQ 1736 (CCPA 1973).

The Examining Attorney refused registration of the Applicant’s mark on the grounds that the applied-for mark GODDESSES HERA is so similar to the Registered mark HERA’S GOLD as to cause a likelihood of confusion. However, fair consideration of the relevant factors set out in *In re E.I. du Pont de Nemours & Co.*, supra, establishes that there is no such likelihood of confusion.

2. THE MARKS DIFFER IN APPEARANCE

The first DuPont factor is of particular importance, and is directed to “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

In comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether they are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods Inc., v. Societe des Produits Nestle S.A.*, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

Similarity or dissimilarity is determined based on the marks in their entireties. It is improper to dissect the marks into their various components, as the analysis must be based on the entire marks, not just the parts thereof. *In re Nat’l Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 212 USPQ 233, 234 (CCPA 1981) (a mark should not be dissected and considered piecemeal; rather, the mark must be considered as a whole in determining likelihood of confusion).

As to appearance, when considered in their entirety, the marks differ significantly. The inclusion of the formative GODDESSES before HERA in the applied-for mark creates a very distinct appearance when compared to HERA’S GOLD of the Registered mark. Not only are the positions of HERA and HERA’S within the respective marks reversed, but the presence of the additional formatives GODDESSES and GOLD certainly causes the marks to appear distinct to customers. *See e.g. In re Best Prods. Co.*, 231 USPQ 988, 990 (TTAB 1986) (BEST JEWELRY and design (with “JEWELRY” disclaimed) for retail jewelry store services, and JEWELERS’

BEST for bracelets, not likely to cause confusion). Any superficial similarities between GODDESSES and GOLD is far outweighed by the numerous visual, not to mention sound and meaning, differences between the formatives GODDESSES and GOLD.

The Examining Attorney asserts in the Final Office Action of August 29, 2015 that the applied-for mark and the Registered mark are similar in sound and appearance, because both marks include the term “HERA,” and each mark has an additional word that begins with a “G.” While the Examining Attorney states that “a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression,” the Examining Attorney has failed to provide rational reasons as to why the alleged similarities in sound and appearance between the applied-for mark and the Registered mark deserve additional weight in concluding that there is a likelihood of confusion between the marks. The Examining Attorney’s analysis is contrary to the cases relied upon by the Examining Attorney, in particular the cited quote from *In re Nat’l Data Corp.*, which requires the Examining Attorney to articulate “rational reasons” why more weight has been given to a particular feature of a mark. 224 USPQ at 751; *see also In re Cynosure Inc.*, 90 USPQ2d 1644, 1646 (TTAB 2009).

In asserting that the applied-for mark and the Registered mark are similar in sound and appearance the Examining Attorney has failed to articulate sufficient reasons why the features of “HERA” and an additional word that begins with a “G” of the Registered mark warrant any additional weight in the analysis of the respective marks. To the contrary, GODDESSES is arbitrary with respect to the applied-for-goods, is the initial part of the applied-for mark, and therefore the formative GODDESSES will make a greater impression on consumers. *See Palm Bay Imps., Inc.*, 73 USPQ2d at 1692; *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895,



1897 (TTAB 1988) (it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered when making purchasing decisions). Since a feature such as the formative “GODDESSES” in the applied-for mark is likely to make a greater impression upon consumers as the initial part of the mark, it is improper to discount the presence of “GODDESSES” in the applied-for mark. This difference between marks alone may reduce confusing similarity even when the marks may include similar or identical words. *See e.g. Kellogg Co. v. Pack'em Enters. Inc.*, 21 USPQ2d 1142, 1144-46 (Fed. Cir. 1991) (on summary judgment, held that no likelihood of confusion exists between mark FROOTIE ICE and elephant design for packages of flavored liquid frozen into bars and mark FROOT LOOPS); *see also Keebler Co. v. Murray Bakery Prods., Inc.*, 9 USPQ2d 1736 (Fed. Cir. 1989) (PECAN SHORTIES not likely to cause confusion with PECAN SANDIES for cookies).

While the Examining Attorney has asserted that “HERA” in connection with the goods at issue is strong, this alone, even if it were true, which applicant does not admit, would not warrant focusing only on any perceived superficial similarities of the respective marks without taking into consideration the significant differences in sound and appearance between the applied-for mark and the Registered mark. Applicant respectfully notes that the Registered mark includes “HERA’S,” (emphasis added) and not just “HERA,” and therefore the assertion that “HERA” is strong is completely irrelevant due to the manner in which the formative is used in the Registered mark. Not only is “HERA” visually and phonetically different from “HERA’S,” but the respective meanings are also different. HERA identifies an entity or individual, while HERA’S signifies possession. By artificially inflating the importance of “HERA’S” in the Registered mark, the Examining Attorney has taken the position that any mark that contains the formative “HERA” in connection with the

goods at issue would result in a finding of likelihood of confusion with the Registered mark, even though the Registered mark itself does not contain the formative “HERA.”

The Examining Attorney has also asserted, with respect to the appearance of the respective marks, that the “proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks.” Once again, the Examining Attorney appears to assert that the presence of “HERA’S” in the Registered mark and “HERA” in the applied-for mark is sufficient to result in a finding of likelihood of confusion between the respective marks.

However, such an assertion requires that the average purchaser retain a general impression of “HERA” from the Registered mark, which as discussed above, is not even the form of “HERA” that is present in the Registered mark. Accordingly, the Examining Attorney has used an adaptation of the Registered mark in analyzing the respective marks in order to attempt to assert that there are similarities between the respective marks. It is unlikely that a consumer would focus on the formative HERA alone in the applied-for mark, and therefore it is not reasonable to assert that the applied-for mark and Registered mark are similar solely due to the presence of HERA and HERA’S in the respective marks. *See e.g. Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1332 (TTAB 1992) (public will readily recognize the differences in the marks MARSHALL FIELD’S and MRS. FIELDS); *see also Sunbeam Corp. v. American Safety Razor Co.*, 207 USPQ 799, 805 (TTAB 1980) (marks THE LADY and LADY SUNBEAM sufficiently different).

### 3. THE MARKS DIFFER IN SOUND

The applied-for-mark and the Registered do not convey the same sound as a result of the possessive form of “HERA” in the Registered mark, the position of HERA and HERA’S in the

applied-for mark and Registered mark respectively and the presence of the additional formatives GODDESSES and GOLD in the respective marks. Contrary to the assertions of the Examining Attorney, simply because both marks include the term “HERA,” and each mark has an additional word that begins with a “G” does not mean that the marks are similar in sound. Instead, the applied-for mark and Registered mark are highly distinct in terms of sound.

The applied-for mark “GODDESSES HERA” has significantly more syllables than the Registered mark “HERA’S GOLD,” “GODDESSES” and “GOLD” despite beginning with the letter “G,” are phonetically distinct and sound entirely different. Likewise, “HERA” in the applied-for mark and “HERA’S” in the Registered mark also sound distinct, and the order of pronunciation of “HERA’S” and “HERA” in the respective marks are also completely different due to the reversal of positions of “HERA” and “HERA’S” within the respective marks. Therefore, despite the alleged similarities between the applied-for mark and the Registered mark asserted by the Examining Attorney, the respective marks are not at all similar in terms of sound. Even though there may be some overlap, “[t]he fact that one mark may bring another mark to mind does not in itself establish likelihood of confusion as to the source.” *In re P. Ferrero & C. S.p.A*, 178 USPQ 167, 168 (CCPA 1973); *see also Eli Lilly & Co. v. Natural Answers Inc.*, 56 USPQ2d 1942, 1946 (7th Cir. 2000).

#### 4. THE MARKS DIFFER IN CONNOTATION

Commercial impression or connotation is another factor that weights against a finding of likelihood of confusion. The applied-for mark is GODDESSES HERA, and conveys one particular meaning, namely, the Greek goddess of women, marriage and childbirth, and the wife and sister of Zeus. In contrast, the Registered mark as a whole has a meaning of “gold possessed by Hera.” Therefore, the overall meaning of the Registered mark and the applied-for mark are clearly

distinguishable, with the applied-for mark referring to a Greek goddess and the Registered mark referring to an object.

The formative GODDESSES in the applied-for mark reinforces the particular connotation of the applied-for mark referring to the Greek goddess. The Examining Attorney asserts in the Final Office Action of August 29, 2015 that “HERA’S as a possessive personifies the word,” and that “the use of GODDESSES by applicant also personifies the name.” Applicant respectfully submits that even if HERA’S personified GOLD in the applied-for mark, which applicant does not admit, any alleged personification of “HERA” by “GODDESSES” in the applied-for mark would have a completely different connotation than attributing human nature or character to “gold.” Instead, if “HERA” from the applied-for mark was an embodiment or incarnation of “GODDESSES,” this is a completely different meaning from attributing human nature or character to an object, such as gold.

The Examining Attorney further asserts in the denial of the Request for Reconsideration dated February 29, 2016 that applicant’s reference to HERA in its applied-for mark has a similar commercial impression to the Registered mark, because “the mythological goddess Hera was referred to as ‘golden-throned’ and...she was given the golden apple of immortality.” The Examining Attorney appears to allege that consumers would associate gold or golden objects with HERA, and thereby applicant’s use of HERA in its applied-for mark, without any reference to gold or golden objects, alone is sufficient to convey the same connotation as Registrant’s mark. As mentioned above, the applied-for mark conveys the impression of the goddess Hera, while the Registered mark conveys the impression of “gold possessed by Hera.” The evidence offered by the Examining Attorney with the denial of the Request for Reconsideration dated February 29, 2016 actually further reinforces the connotation of “gold possessed by Hera” of the Registered mark. *See* Attachment 2 ([Hera] is described as ‘golden-throned’, and if often thus

represented); *see also* Attachment 7 (I sing of gold-throned Hera); Attachment 9 (as a wedding present, Gaia, mother of Earth, gave [Hera] the golden apples of immortality); Attachment 10 (The judgment of Paris was a contest between the three most beautiful goddesses of Olympus—Aphrodite, Hera, and Athena—for the prize of a golden apple addressed to “the fairest”); Attachment 18 (the golden apples which Ge had given to Hera at her marriage with Zeus); Attachment 19 (gold-shod Hera). If Hera is understood to be associated with golden objects, such as thrones and apples, then the Registered mark HERA’S GOLD merely conveys the these golden objects possessed by Hera themselves, and does not convey the impression of the goddess Hera herself. Likewise, it is improper to read into the applied-for mark a connotation of “gold,” since there is no mention or connotation of gold provided by Applicant’s mark.

While the Applicant’s mark has a significantly different appearance from the Registered mark sufficient to avoid any likelihood of confusion, even where marks are identical, there is no likelihood of confusion where the marks convey different meanings. *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (no likelihood of confusion between CROSS-OVER for bras and CROSSOVER for ladies’ sportswear, namely, tops, shorts and pants); *In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (no likelihood of confusion between PLAYERS for men’s underwear and PLAYERS for shoes); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629, 630 (TTAB 1977) (no likelihood of confusion between BOTTOMS UP for ladies’ and children’s underwear and BOTTOMS UP for men’s suits, coats and trousers).

##### 5. THE PURCHASERS ARE SOPHISTICATED

Another relevant factor in analyzing whether there is a likelihood of confusion between respective marks involves “the conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. careful, sophisticated purchasing.” *In re E.I. Du Pont de Nemours & Co.*, 177 USPQ

at 567. The Registrant's goods and Applicant's goods include gaming machines sold into the highly regulated gaming industry. The goods themselves and procedures for their marketing, sale, operation and maintenance, are highly regulated. Furthermore, gaming is part of the entertainment industry in general, where there is a heightened awareness of trademarks and buyers would likely have sufficient knowledge in the field of trademarks so as to make source confusion unlikely. In addition, the goods are also very expensive. *See In re Thor Tech Inc.*, 113 USPQ2d 1546, 1551 (Fed. Cir. 2015) (in making purchasing decisions regarding expensive products the reasonably prudent person standard is elevated to the standard of the discriminating purchaser).

Only properly licensed buyers may purchase the gaming machines of the Applicant and the Registrant, because the gaming industry is highly regulated. The purchasing decision thus has to be made with due care and deliberation, and the buyers of gaming machines, such as those sold by the Applicant and the Registrant, are sophisticated purchasers. When the purchasers of a product are highly trained professionals, they know the market and are less likely than untrained consumers to be misled or confused by any perceived similarities of different marks. *See Virgin Enters. Ltd. v. Nawab*, 67 USPQ2d 1420, 1428 (2d Cir. 2003) (professional buyers are expected to have greater powers of discrimination). Even where the consumers may be the same, their sophistication is important and often dispositive because sophisticated consumers are expected to exercise greater care. *Elec. Design & Sales Inc. v. Elec. Data Sys. Corp.*, 21 USPQ2d 1388, 1292 (Fed. Cir. 1992).

Buyers of gaming machines are generally familiar and conscience of trademarks and other identification displayed, for example on slot machines. Given the large numbers of such machines generally present on a gaming floor, a buyer of such machines would consider the

attractiveness of a name or mark associated with a machine in making a purchasing decision, along with other technical features, and these purchasers would certainly be able to distinguish HERA'S GOLD from GODDESSES HERA and understand that these need not come from a common source simply because they both include a form of the formative "HERA." *In re N.A.D. Inc.*, 224 USPQ 969, 971 (Fed. Cir. 1985) (sophisticated purchasers who would buy with great care and unquestionably know the source of the goods could readily distinguish NARKOMED from NARCO); *see also Hewlett-Packard Co. v. Human Performance Measurement Inc.*, 23 USPQ2d 1390, 1396 (TTAB 1992) (highly educated, sophisticated purchasers who know their equipment needs are expected to exercise a great deal of care in equipment selection).

While the gaming machines of Applicant and the Registrant may be made available to the general adult public, only properly licensed buyers may purchase gaming machines. Therefore, it is irrelevant that the general consuming public may ultimately use the gaming machines, because Applicant is not attempting to register its mark GODDESSES HERA for gaming related services, and the general consuming adult public is not the purchaser or potential purchaser of Applicant's gaming machines. In determining whether there exists a likelihood of confusion, the proper inquiry centers on the confusion of the consumers in the market for the particular product at issue. *Cont'l Plastic Containers Inc. v. Owens-Brockway Plastic Prods. Inc.*, 46 USPQ2d 1277, 1282 (Fed. Cir. 1998).

In *Cont'l Plastic Containers*, the Court of Appeals for the Federal Circuit found the trade dress of plastic juice bottles to not be confusingly similar, because wholesale purchasers were found to be sophisticated buyers unlikely to be confused over the source of the bottles. *Id.* The Court of Appeals for the Federal Circuit stated that consumers of the juice contained within the

bottles were not the relevant consumers for purposes of likelihood of confusion of the trade dress of the bottles, because the juice consumers were buying juice and not purchasing the plastic bottles. *Id.* Likewise, the general consuming adult public is not the purchasers of the gaming machines themselves, and therefore the level of care is that of a properly licensed professional buyer of gaming machines for the gaming industry.

Both the applicant and the registrant use their marks on expensive goods sold in the highly regulated gaming industry to sophisticated purchasers who are more discriminating and not likely to be confused as to the source or origin of the respective goods sold under their respective trademarks. *Elec. Design & Sales Inc.*, 21 USPQ2d at 1392 (there is always less likelihood of confusion where goods are expensive and purchased after careful consideration)



6. CONCLUSION

Given the knowledge, care and deliberation required of buyers within the gaming industry in making the purchasing decisions with respect to Applicant's and the Registrant's goods, the noticeably distinguishable differences in appearance, sound and meaning in the applied-for mark GODDESSES HERA and the Registered mark HERA'S GOLD creating completely distinct commercial impressions, it is clear that confusion between the respective marks is unlikely.

Consequently, Applicant respectfully requests that the refusal to register the mark GODDESSES HERA be reversed.

Respectfully submitted,

Dated: April 25, 2016

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